

## **Key Changes In External Commercial Borrowings Policy And Companies Amendment Act, 2019**

The Reserve Bank of India recently relaxed the end-use stipulations under external commercial borrowings framework for corporates and non-banking financial companies (NBFCs).

Also, the Companies (Amendment) Act, 2019 has been notified on July 31st, 2019. On one hand, the Amendment retains most changes brought about by the Ordinance to rationalize penalties and the ease compliance burden on businesses and on the other, the Amendment also retains the 'crackdown' provisions on black money and shell companies. The Act also seeks to tighten Corporate Social Responsibility (CSR) compliance and re-categorization of specific offences as civil offences.

Below are the highlights of the above mentioned updates for your kind reference:

### **ECB Update: Boost in the Indian Economy, The Reserve bank of India Liberalize the Framework of External Commercial Borrowings**

Key Changes introduced by the Reserve Bank of India through the above-stated circular are reproduced herein below:

The Reserve Bank of India (RBI) has rationalize the end-use provisions of External Commercial Borrowings vide RBI/2019-20/20 A.P. (DIR series) Circular no. 04 dated July 30, 2019.

- 1. ECBs from all eligible borrowers with a minimum average maturity period of 10 years can now be used for working capital purposes and general corporate purposes, the RBI said in a release.** Earlier, the ECB utilized for working capital purposes and general corporate purposes can only be availed from the foreign equity holder with a minimum average maturity period of five years. With this amendment, the Indian eligible borrowers can now get an immediate access to overseas long-term debt pool to fund their working capital and/or general corporate requirements without only relying on either Indian lenders or equity holders of the company. Most importantly, NBFCs are also allowed to raise ECB for on-lending for the same purpose provided that the condition of average maturity period is adhered to.
- 2. ECBs with a minimum average maturity period of 7 years can be availed by eligible borrowers for repayment of Rupee loans availed domestically for capital expenditure as also by NBFCs for on lending for the same purpose. For repayment of Rupee loans availed domestically for purposes other than capital expenditure and for on-lending by NBFCs for the same, the minimum average maturity period of the ECB is required to be 10 years.** Earlier, the ECB utilized for repayment of Rupee loans can only be availed from the foreign equity holder with a minimum average maturity period of five years.
- 3. It has been decided to permit eligible corporate borrowers to avail ECB for repayment of Rupee loans availed domestically for capital expenditure in manufacturing and infrastructure sector if classified as SMA-2 or NPA, under any one-time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, except foreign branches/ overseas subsidiaries of Indian banks, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework.**

Now with this exemption, the entire lot of companies engaged in the ailing manufacturing and infrastructure sector, gets an immediate access to foreign funds through ECB route without actually going down under the IBC. The promoters can now salvage their companies by accessing the pool of Page 2 of 4 funds of various recognized lenders when they are undergoing the review period. The ECB lenders can also get a clear comfort as the entire loan can directly be assigned to them and the money can be used for repaying the rupee term loan lender without involving IBC.

The above mentioned changes can help relieve a lot of fund raising pressure on Indian eligible borrowers which are under fiscal stress but will also help NBFCs by giving them access to large pool of funds which can now be used for on-lending in India, subject to compliance of extent ECB framework.

**Companies (Amendment) Act, 2019: Highlights**

The Companies (Amendment) Act, 2019 has recently received the assent of the President on the 31st day of July, 2019.

Mentioned below the brief to the amendments that have been passed in amendment act.

1. **Substitution of the word “Registration” with “Filing”-Amendment to Section 26:** The extent provisions under Section 26 require a company to deliver a copy of the prospectus to the Registrar for registration. The Amendment Bill seeks to amend this requirement by substituting the word “Registration” with “Filing”.
2. **Issue of dematerialized shares: Issue of shares in dematerialized format:** The term “Public” has been omitted under Section 29(1)(b) of the Companies Act, 2013. It denotes that Government would now prescribe the class of companies (including certain unlisted companies), which would mandatorily require to issue the securities only in dematerialized form.
3. As per the Companies Act, in case of Indian Company having holding/subsidiary/associate company outside India, it is allowed to change the financial year as per such Indian Company with the approval of Tribunal. With the amendment Act, power of Tribunal has been transferred to the Central Government. Therefore, after notification of Ordinance, Financial year of Company can be changed with approval of Central Government.
4. **Section 135 (Corporate Social Responsibility):** Amendments are made to carry forward the unspent Corporate Social Responsibility (CSR) amount, to a special account to be spent within three financial years and transfer thereafter to the Fund specified in Schedule VII, such as PM's National Relief Fund.
5. The amendment Act provides for the punishment for debarment from appointment as an auditor or internal auditor of a company, or performing a company's valuation, for a period between six months to 10 years in case of proven misconduct.
6. The pecuniary limits of Regional Director (“RD”) to compound offences under Section 441 of the Companies Act, 2013 is proposed to be increased. The threshold is increased to a fine up to Rs. 25 lakhs.
7. A new clause has been inserted under the Section 164 (Disqualification of a Director) to state that violation of Section 165(1) shall be a ground for disqualification of a director if he/ she breaches the limits of maximum directorship allowed thereunder.
8. The amendment to Section 241 (Application to Tribunal for relief in cases of oppression, etc.) empowers the Central Government to move a matter before the NCLT against managerial personnel on several grounds.
9. Shifting of powers for conversion from public to private companies from National Company Law Tribunal (NCLT) to the Central Government, as well as more clarity with respect to certain powers of the National Financial Reporting Authority (NFRA).
10. **Section 12 (Registered Office of Company):** The amendment Act provides more power to the Registrar of Companies (ROC) to take strict action against those companies which are not working as per the law. Registrar of Companies may do physical verification of the Registered office of Company and if default is found to be made in complying with the provision of Section 12, then the ROC may initiate action for removal of name of the Company.
11. In case of corporate frauds revealed by an investigation by SFIO, the Central Government may make an application to the NCLT for passing appropriate orders for disgorgement of profits or assets of an officer or person or entity which has obtained an undue benefit.
12. Charges can only be registered within a period of 120 days from the date of creation and modification and ad-valorem fees shall also be charged over and above the additional fees in case of delayed filings beyond 60 days. After total of 120 days charge cannot be registered.
13. **Section 87:** Rectification by the Central Government in Register of charges in case of omission and or misstatement of any particulars, in any filing previously made to the Registrar with respect to any charge or modification thereof or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83.

**Amendments under the Penal Provisions:**

1. **Section 92 (Annual Return):** If any company fails to file its annual return under sub-section (4) of Section 92, before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.
2. **Section 157 (Company to inform Director Identification Number to Registrar):** If any company fails to furnish the Director Identification Number under sub-section (1) of Section 157, such company shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues.
3. **Section 203 (Appointment of Key Managerial Personnel):** non-compliance provisions amended to provide that if any company makes any default in complying with the provisions of this section, such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees.
4. **Section 447 (Punishment for Fraud):** Penalty provided under Section 447 of the Companies Act, 2013 has been increased from “twenty lakh rupees”, to “fifty lakh rupees”.
5. **Insertion of new Section 454A (Penalty for repeated fraud):** to provide Penalty for repeated defaults by a company or an officer of a company or any other person having already been subjected to a penalty for default under any provisions of this Act.
6. The Companies (Amendment) Second Ordinance, 2019 is repealed on notification of the Act

Government has made the above-mentioned changes in the Companies Act, 2013 via Companies (Amendment) Act, 2019 to ensure more accountability and better enforcement, to strengthen the Corporate Governance norms and compliance management in the corporate sector as enshrined under the Companies Act, 2013, and transfer of certain responsibilities to National Company Law Tribunal (NCLT). The Government has widened the concept of dematerialization of securities as well in order to bring more transparency, accuracy and to promote the ease of doing business in India.

The stricter penal provisions have been inculcated under the amendment act in order to ensure proper implementation and follow-up of certain provisions of the act. We have attached a summary of key proposals for your consideration. The update also incorporates the highlights of the Economic Survey for the Financial Year 2018-19.